United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: February 28, 2007

TO : Frederick Calatrello, Regional Director
Region 8

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice 530-6050-0120
530-6050-0140

SUBJECT: Kelsey-Hayes Co. a/k/a TRW
Case 8-CA-36737

During bargaining over a shutdown agreement, the Employer proposed that the parties agree that the Employer would pay enhanced severance benefits to employees only if all employees agreed to sign a release of all present and future claims against the Employer. This case was submitted for advice regarding whether the Employer's proposal violated Section 8(a)(5) and (1). The Region has not decided whether the Employer made the shutdown agreement contingent on the Union agreeing to the proposed release.

We conclude that the release as proposed, setting aside the unanimity requirement, was a nonmandatory subject of bargaining upon which the Employer could not insist to impasse because it was too general to be considered intertwined with a mandatory subject. We further conclude that because the release proposal was nonmandatory, the unanimity proposal was also a nonmandatory subject upon which the Employer could not condition agreement.

FACTS

Kelsey-Hayes Co. a/k/a TRW Co. (the Employer) and the United Steelworkers (the Union) have been parties to collective-bargaining agreements for about 50 years covering production and maintenance employees at an Ohio plant. Their most recent agreement was effective from January 28, 2002 to May 16, 2005, with an extension to December 31, 2006.

In April 2005, the Employer announced that it was closing the Ohio plant effective October 2006. Between June 2005 and June 29, 2006, the parties bargained for a shutdown agreement over about ten sessions. Thereafter, the parties exchanged a few emails that discussed bargaining proposals. Enhanced benefits for severance and health insurance payments, beyond what the collective-bargaining agreement provides, were the two primary issues

under discussion.[1] The Employer's proposals included a broad release of all present and future claims against the Employer arising out of the shutdown, the employment relationship and the termination of that relationship.[2]

While bargaining continued, on May 23, about 50 of the Employer's 100 employees filed a federal court action against the Employer and the Union, alleging age discrimination and breach of contract claims arising out of the shutdown against the Employer, and a duty of fair representation claim against the Union.

At the June 29 session, the Employer modified its release proposal to include a new unanimity provision; it required that the Union agree that every employee would individually sign a release.[3] Under this new proposal,

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[1] The collective-bargaining agreement provides for 8 weeks of severance pay for those employees with at least 10 years of continuous service, and provides for 6 months health care coverage following a layoff.

In fall 2006, the parties resolved the health insurance issue in a separate agreement through their grievance procedure.

[2] In relevant part the proposed release here required the waiver of:

any and all obligations, claims, causes of action, liabilities, grievance or arbitration claims, and claims and demands of any kind *which he now has or ever may have* against the Company relating to or arising out of the plant shutdown, the employment relationship, and the termination of that relationship, including but not limited to, . . . any civil action under Title VII of the Civil Rights Act of 1964 . . ., the Civil Rights Act of 1991, the Age Discrimination in Employment Act . . ., the Americans with Disabilities Act, the Family Medical Leave Act, . . ., the [NLRA], . . . any state antidiscrimination statutes, federal common law, state common law, and/or any federal state or local statute, ... except those claims which are based on alleged violations of this Shutdown Agreement, any individual Workers' Compensation and/or state unemployment insurance compensation claims.

[3] The release (Agreement ¶24) reads:

without unanimous participation in the releases, no employees would receive enhanced benefits.

The Union objected that the Employer added this language to respond to the employees' lawsuit, and that the proposal constituted a nonmandatory or an illegal subject of bargaining because it could not control what the employees did with their own lawsuit.

As to the employees' lawsuit, on about September 28, the district court dismissed all claims against the Employer and the Union, with the exception of a single state law age discrimination claim against the Employer.

During the investigation, the Employer indicated it was willing to modify its proposal to more narrowly tailor the release. To date, however, it has not done so.

ACTION

Proposed release was itself a nonmandatory subject of bargaining

We conclude that the release as proposed, setting aside the unanimity requirement, was a nonmandatory subject of bargaining because it was too general to be considered to be intertwined with a mandatory subject.[4] Thus, the release was a nonmandatory subject of bargaining upon which the Employer could not insist to impasse.

Releases that authorize an employee waiver of future claims generally are nonmandatory subjects of bargaining.[5]

This Plant Shutdown agreement shall not become effective, and no severance payments or other benefits described herein shall be provided unless and until the Company receives a fully executed and unrevoked "Receipt and Release" attached hereto from each and every Affected Employee as defined by this agreement.

[4] We find no basis for concluding that either the release or the unanimity requirement was an illegal subject.

[5] See Regal Cinemas, Inc., 334 NLRB 304, 305 n.8 (2001), enf'd, 317 F.3d 300 (D.C. Cir. 2003); Borden, Inc., 279 NLRB 396, 399 n.5 (1986). See also Sea Bay Manor Home for Adults, 253 NLRB 739 (1980)(interest arbitration was a mandatory subject of bargaining because it was intertwined with mandatory subjects), enf'd mem., 685 F.2d 425 (2d Cir. 1982).

A release constitutes a mandatory subject of bargaining only if it exhibits interdependence, or is intertwined, with mandatory subjects of bargaining. Borden, Inc.,[6] and Regal Cinemas, Inc.,[7] illustrate how the nexus between the particular releases and the mandatory subject of severance pay caused them to be nonmandatory or mandatory subjects.

In Borden, Inc., a general release of all future claims by employees was a nonmandatory subject of bargaining. The release was not part of the employer's initial severance pay proposal and was not added as a quid pro quo for any union concession.[8] The ALJ, adopted by the Board, explained that "severance pay can be paid pursuant to a severance agreement without the execution of a release."[9] Further, a waiver of a future right to sue on an already completed period of employment is so attenuated as to not be a mandatory subject of bargaining.[10] Thus, the nonmandatory release and the mandatory subject of severance pay were not "inextricably intertwined" and the release was not a mandatory subject of bargaining.[11]

By contrast, in Regal Cinemas, the Board found that the severance pay and release were so "inextricably" intertwined as to make the release a mandatory subject of bargaining. The employer in Regal was seeking not a general release of all employee claims, but rather a specific release linked only to "claims arising from the termination of the employees – the very same employment transaction that occasioned bargaining over severance pay."[12] The Board explained that "severance pay and claims arising from the termination (such as discriminatory discharge claims) are properly viewed as reciprocal effects: benefits to employees, costs to the employer."[13]

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[6] 279 NLRB at 399.

[7] 334 NLRB at 305-306.

[8] 279 NLRB at 399.

[9] 279 NLRB at 399.

[10] 279 NLRB at 399 n.5.

[11] 279 NLRB at 399.

[12] 334 NLRB at 305.

[13] Id. at 305.

The Board in Regal distinguished the Borden release as so general that it conceivably would have constituted a waiver of such claims as toxic tort claims, unrelated to the employment transaction that occasioned bargaining.[14] The Board also noted that the employer appeared to have been prepared to bargain over an even narrower release.[15] The Board thus found the release to be intertwined with the mandatory subject of severance pay and a mandatory subject.[16]

Here, the June 29 proposed release, without considering the unanimity requirement, was closer to Borden than to Regal, and thus was a nonmandatory subject. The June 29 language was far broader than the Regal release, waiving current and future claims that the employee had or ever will have against the Employer, including statutory claims under the Act and other federal statutes and state causes of action. Written as a general release of all employee claims, it was not narrowly tailored to be a quid pro quo to the severance package relating to the plant shutdown. Therefore, the release, even without considering the unanimity requirement, was a nonmandatory subject.

The Unanimity Requirement

We note that the Employer has indicated it is willing to modify its release proposal to be narrowly tailored as a release to claims arising out of the shutdown consistent with the Borden and Regal guidelines. It may well be that a release limited to claims arising out of terms covered by the shutdown agreement would be inextricably bound to the mandatory subject of bargaining, and would itself be mandatory. In that event, it would be necessary to decide whether any unanimity aspect of the Employer's proposal would itself be mandatory.

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[14] Id. at 305 n.8.

[15] Id. at 305.

[16] See also Utility Vault, 345 NRLB No. 4, slip op. at 1 n.2, 4-5 (2005)(administrative law judge, affirmed by the Board, found that an individual arbitration agreement that the employer sought to impose unilaterally on new hires was a mandatory subject of bargaining; the individual agreement was much broader than the collectively bargained dispute resolution procedure, covered mandatory subjects of bargaining, and included unfair labor practice charges).

The unanimity requirement seeks to have the Union waive the individual rights of employees to pursue claims. But a union does not have the authority to bargain away those rights in exchange for collectively-bargained rights.

Although the Supreme Court has not ruled on the precise question whether a union can prospectively waive employee statutory rights, even if that waiver is clear and unmistakable,[17] the majority of the circuit courts have read Alexander v. Gardner-Denver, 415 U.S. 36 (1974), to find such a waiver unenforceable.

In Alexander v. Gardner-Denver, the Supreme Court, stated, "we think it clear that there can be no prospective waiver of an employee's rights under Title VII."[18] The Court therefore found that an employee did not waive his Title VII claim by first pursuing arbitration under a collective bargaining agreement's nondiscrimination clause; the employee retained the statutory right to a trial. While a union may waive "certain rights involving collective activity, such as the right to strike," the Court stated that Title VII "stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities."[19]

The Court subsequently held that individual agreements to arbitrate statutory claims are enforceable. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (applying the Federal Arbitration Act, an employer could compel an individual employee to arbitrate his Age Discrimination in Employment Act claim pursuant to arbitration agreement contained in the employee's application to the New York Stock Exchange to be a registered securities representative); Circuit City Stores v. Adams, 532 U.S. 105, 112-119 (2001) (compelling

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[17] See Wright v. Universal Maritime Service Corp., 525 U.S. 70, 72, 77-82 (1998), (collective-bargaining agreement did not contain a clear and unmistakable waiver of the employee's right to access of courts for statutory ADA claim; therefore it was "unnecessary to resolve the question of the validity of a union-negotiated waiver.")

[18] 415 U.S. at 51.

[19] Id. at 51. The Court observed that a union may waive rights related to "collective activity," such as the right to strike.

arbitration, under Federal Arbitration Act, of individual's agreement in his employment contract to arbitrate disputes, including statutory claims, arising out of his employment).

Notwithstanding Gilmer and Circuit City, a majority of courts, including both the D.C. Circuit, where the Employer could seek review of any Board order, and the Sixth Circuit, where this case arises, have found that the principle of Gardner-Denver remains: union waivers of individual employees' statutory rights are unenforceable.[20]

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[20] See, for example, Airline Pilots Ass'n Int'l v. Northwest Airlines, Inc. (ALPA), 199 F.3d 477, 484 (1999), judgment vacated and reinstated en banc, 211 F.3d 1312 (D.C. Cir. 2000), cert. denied, 531 U.S. 1011 (2000); Penny v. United Parcel Serv., 128 F.3d 408 (6th Cir. 1997) (holding that "an employee whose only obligation to arbitrate is contained in a [collective-bargaining agreement] retains the right to obtain a judicial determination of his rights under a statute such as the ADA"). See also Albertson's, Inc. v. UFCW, 157 F.3d 758 (9th Cir. 1998) (holding that employees could litigate FLSA claims without resorting to the collective-bargaining agreement's grievance and arbitration procedures), cert. denied, 528 U.S. 809 (1999); Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519 (11th Cir. 1997) (holding that a collective-bargaining agreement's arbitration clause did not bar the plaintiff's ADA claim); Harrison v. Eddy Potash, Inc., 112 F.3d 1437 (10th Cir. 1997) (holding that the plaintiff was not required to exhaust the collective-bargaining agreement's arbitration procedures before litigating a Title VII claim), vacated on other grounds, 524 U.S. 947 (1998); Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir.) (holding that "the union cannot consent for the employee by signing a [collective-bargaining agreement]"), cert. denied, 522 U.S. 912 (1997); Varner v. National Super Mkts., Inc., 94 F.3d 1209 (8th Cir. 1996) (holding that failing to exhaust the collective-bargaining agreement's arbitration procedures did not bar the plaintiff's Title VII claims), cert. denied, 519 U.S. 1110 (1997); Tran v. Tran, 54 F.3d 115 (2d Cir. 1995) (holding that a collective-bargaining agreement did not bind a plaintiff to arbitrate her FLSA claim before seeking federal court relief), cert. denied, 517 U.S. 1133 (1996); Beljakovic v. Melohn Properties, Inc., 2005 WL 2709174 (S.D.N.Y. 2005)("only an individual can determine in what forum he will vindicate . . . statutory rights").

The D.C. Circuit, in ALPA, summed up this majority view by concluding:

> We see a clear rule of law emerging from Gardner-Denver and Gilmer. Unless the Congress has precluded his doing so, an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him.[21]

In ALPA, the D.C. Circuit found that the employer, covered by the Railway Labor Act, was not obligated to bargain over its requirement that unit employees agree to arbitrate their statutory employment discrimination claims.[22] The court read Gardner-Denver and Gilmer as establishing that "an individual may prospectively waive his own statutory right to a judicial forum, but his union may not prospectively waive that right for him."[23] As to bargaining obligations, the court focused on "mutuality;" parties must bargain only over proposals on which both sides have authority to offer and concede. Because a union has no authority to concede the individual's statutory right of access to courts, the D.C. Circuit concluded that that statutory right is a nonmandatory subject of bargaining.[24]

In Penny v. United Parcel Serv., the Sixth Circuit also relied, among other things, on "the distinctly separate nature of contractual and statutory rights," in concluding that Gilmer did not overrule Gardner-Denver and that unions could not waive employee statutory rights. The Sixth Circuit reasoned that only the individual employee could waive the access to a judicial forum.[25]

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[21] ALPA, 199 F.3d at 484.

[22] ALPA, 199 F. 3d at 480-481. ALPA arose under the Railway Labor Act, but the court applied and considered cases construing the duty to bargain under the NLRA.

[23] ALPA, 199 F.3d at 484.

[24] ALPA, 199 F.3d at 485 (citations omitted).

[25] Id. at 414. See also ALPA, 199 F.3d at 484; Pryner v. Tractor Supply, 109 F.3d at 363.

The Fourth Circuit's view that a union may waive employee statutory rights, is distinctly in the minority. See Austin v. Owens-Brockway glass Container, Inc., 78 F. 3d 875 (4th Cir.), cert. denied, 510 U.S. 980 (1996). See

Following this reasoning, we have also concluded that a union cannot waive an individual's right to sue over individual statutory claims.[26]

Given our conclusion that the Employer's release proposal is not mandatory, the unanimity portion of the proposed release is, a fortiori, nonmandatory. [*FOIA Exemption 5*

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B.J.K.

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also Brown v. ABF Freight Systems, Inc., 183 F. 3d 319, 331-332 (4th Cir. 1999) (holding that while union can waive employee access to courts, waiver in that case was not clear and unmistakable) (citing Austin).

[26] Capitol Ford, Case 32-CA-18464-1, Advice Memorandum dated January 30, 2002 at p.6.